

REPUBLIC OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

Case No: A377/2011

DATE:15/05/2012

REPORTABLE

In the matter between:

AMAVEL MOTA MOREIRA

Appellant

and

GEOFFREY KEITH McLOUGHLIN

Respondent

JUDGMENT

MEYER, J

[1] This is an appeal against the finding of the lower court, which is to the effect that the appellant's counterclaim in action proceedings before that court does not disclose a cause of action.

[2] The appellant is the defendant in an action instituted against him in the Magistrates' Court, Pretoria and in which proceedings he also instituted a claim

in reconvention against the respondent. The substance of his counterclaim reads as follows:

- '4. Pursuant to the written agreement of sale attached to plaintiff's summons and during December 2007, the parties reached an oral agreement that Plaintiff would pay Defendant occupational rent to the amount of R20 000.00 per month between the date of occupation to date of transfer of the property in plaintiff's name. The dates of occupation and registration are as alleged in the summons.
- 5. Alternatively to paragraph 4 of the counterclaim, defendant avers that clause 4 of the agreement of sale does not reflect the common intention of the parties, in that upon signing of the agreement the parties agreed that occupational rent would be payable where one party enjoys occupation while the other party is still the registered owner, and that the amount would be the subject of a later verbal agreement between the parties, and that through common error between the parties they failed to record same in paragraph 4 of the agreement of sale.
- 6. Despite demand plaintiff has failed to pay occupational rent at all, and is indebted to defendant in the sum of R27 741.92.

WHEREFORE defendant claims from plaintiff:

- 1. Payment of the amount of R27 741.92
- 2. Interest thereon calculated at the rate of 15.5% per annum a tempore morae until date of payment.
- 3. Costs of suit.
- 4. Further and/or alternative relief, including rectification of the agreement of sale as per paragraph 5 of the counterclaim together with prayers 1 to 3 above.'

[3] The written agreement concluded between the parties to which reference is made in the counterclaim is a printed form at the head of which appears the name of the estate agents through which the transaction was negotiated and clinched. Below that appear the words "Offer to Purchase (Re-Sale)" and then follows the terms of the contract with blank spaces in which certain particulars were filled in with a pen. Clause 4 reads:

'4. Occupation

Occupation of the property shall be given to the purchaser on _____. If the date of occupation does not coincide with the date of registration of transfer of

the property to the purchaser, the party enjoying occupation of the property whilst it is registered in the name of the other party shall, in consideration thereof, and for the period of such occupation, pay to the other party a rental of R_____ (.....) monthly in advance from date of occupation. No tenancy shall be created by the purchaser taking occupation prior to registration of transfer and the purchaser shall immediately vacate the property on cancellation of the sale whatever the reason thereof. The purchaser shall not be entitled to make any alteration or additions to the property prior to registration of transfer.'

The word "*TRANSFER*" was filled into the first space and clause 4 accordingly provides for occupation of the property to be given to the purchaser, who is the respondent, on registration of transfer thereof. The other space which forms part of the provision relating to the payment of occupational rent was left blank. Also presently relevant is clause 11, which provides that the '... agreement constitutes the entire contract between the parties and that no agreement '...to cancel, alter or add to...' it '...shall be of any force or effect unless signed by both seller and purchaser.'

[4] The averments in the particulars of claim that the respondent took occupation of the property on or about 26 January 2008 and that registration of transfer thereof into his name took place on 12 March 2008 are incorporated by reference into the counterclaim.

[5] Further particulars were requested by the respondent to enable him to plead to the counterclaim. The particulars furnished elaborate on the alleged oral agreement and alternative plea of rectification. The appellant's reply in response

to the respondent's request for him to state the precise words in terms of which he alleges that the written agreement of sale falls to be rectified is to the effect that the words '*a sum and subject to any conditions to be agreed verbally between the parties*' are to be filled in the space which was left blank in clause 4 of the written agreement..

[6] The respondent did not deliver an exception to the appellant's counterclaim. Instead a plea was delivered in which the averments contained in paragraphs 4 and 5 of the appellant's counterclaim were denied.

[7] On 14 February 2011 at 15h10, the respondent's attorneys of record served a notice in terms of Rule 29(4) of the Magistrates' Court Rules of Court on the appellant's attorneys of record in terms whereof the appellant was notified that the respondent intends to make application under the provisions of that Rule at the commencement of the trial on 16 February 2011 for an order declaring the defendant's counterclaim bad or unsustainable in law on the grounds set out in the notice. The respondent's application was made at the commencement of the trial. The trial court was addressed by the legal representative for each party whereupon judgment was given in favour of the respondent on that question.

[8] In substance the respondent's objection to the appellant's counterclaim amounts to an exception that the counterclaim discloses no cause of action. Counsel for the appellant, Ms MG Goia, submitted that the respondent should have delivered an exception in terms of the provisions of Rule 19 of the Magistrates' Court Rules of Court and the trial court should not have entertained

the respondent's exception in terms of Rule 29(4) *in limine* and separately from the other questions.

[9] Rule 29(4) of the Magistrates' Courts Rules of Court reads:

'If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall at the request of any party make such order unless it appears that the questions cannot conveniently be decided separately.'

[10] The wording of Rule 29(4) of the Magistrates' Court Rules of Court is almost identical to that of Rule 33(4) of the Uniform Rules of Court. Exceptions are governed under Rule 19 of the Magistrates' Court Rules of Court and its wording is also almost identical to that of Rule 23 of the Uniform Rules.

[11] The appellant's counsel referred us to the following *dictum* by Stegmann, J in *Kriel v Hochstetter House (Edms) Bpk* 1988 (1) SA 220 (T), at pp 230H – 231C:

'Dit is na my mening nodig om n onderskeid te tref tussen regspunte wat behoorlik *in limine* geopper mag word, en regspunte wat by wyse van eksepsie geneem behoort te word. Eksepsies word deur Reël 23 van die Eenvormige Hofreëls gereël. Waar 'n pleitstuk vaag en verwarrend is, of beweringe mis wat nodig is om die aksie of verweer te staaf, kan die teenparty 'n eksepsie lewer. Ingevolge Reël 23(3) moet die gronde waarop die eksepsie berus in die eksepsie aangegee word. Die party wie se pleitstukke by wyse van eksepsie aangeval word moet gevolglik skriftelike kennis van die eksepsie en die gronde waarop dit berus vooraf ontvang. Wat betref regspunte van so 'n aard dat dit by n verhoor *in limine* geopper mag word, bestaan daar in die Hofreëls geen soortgelyke vereiste nie. In die praktyk word dit egter deur regspraktisyns goed verstaan dat een party nie sy teenstaander met n onverwagse regspunt *in limine* mag verras nie. Die vraag ontstaan of die regsvraag wat die verweerder by die aanvang van die

verhoor geopper het behoorlik *in limine* betoog kon word, of dit wel by wyse van eksepsie geopper moes gewees het.

...

Na my mening is dit duidelik dat die verweerder se sogenaamde punt *in limine* in wese 'n eksepsie was. Geen behoorlike kennis daarvan, of van die gronde waarop dit berus het, is ingevolge Reël 23 aan die eiser gegee nie. Dit moes nooit as punt *in limine* by die verhoor geopper gewees het nie: die verweerder moes kennis van sy voorneme om 'n eksepsie laat (dws na verstryking van die tydperk wat daarvoor vasgestel is) te lewer, gegee het; en hy moes ook die gronde waarop dit berus het behoorlik in die kennisgewing uiteengesit het.'

[12] In *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T), this court, at the request of the defendant in that case, permitted a plea of prescription and three exceptions to different claims in the summons to be entertained in terms of the procedure under Rule 33(4) of the Uniform Rules.

Botha, J said the following, at pp 331J – 332A:

'With regard to whether the exceptions should be entertained at all in terms of Rule 33(4) I am mindful of what was said in *Kriel v Hochstetter House (Edms) Bpk* 1988 (1) SA 220 (T) at 230 and 231. In my view, however, the considerations mentioned in that case do not obtain here. Defendant's objections against the particulars of claim were set out in the plea and at the last pre-trial conference notice, albeit short notice, of the exceptions was given. As a matter of convenience it seems that claim A, B and C will proceed anyway. If the exceptions succeed it will have the effect of curtailing the duration of the trial. I am therefore prepared to approach the exceptions on the basis that they may properly be considered in terms of Rule 33(4).'

[13] In *Allen & Others NNO v Gibbs & Others*, 1977(3) SA 212 (S.E.C.L.D.), at pp 215H – 216C, Kannemeyer, J said this:

'The question remains whether it should have been taken. In *Alexander v. Armstrong*, 1879 Buch. 233 at p. 239, where it was "clear that the proper mode of meeting the present action would have been by way of exception to the plaintiff's declaration," the successful defendant was only allowed

“such costs as he would have incurred if he had excepted to the plaintiff’s declaration.”

In *Scheepers and Nolte v Pate*, 1909 T.S. 353 at p. 360, WESSELS, J. (as he then was), remarked

“.....it is the duty of a litigant to take the most expeditious course to bring the litigation to a conclusion. He should take such exceptions in limine as will dispose of the dispute or bring the proceedings instituted to a conclusion.”

Again, in *Algoa Milling Company v. Arkell and Douglas*, 1918 A.D. 145 at p. 159, INNES C.J., is reported as saying:

“The declaration as drafted discloses no cause of action, and should therefore have been excepted to. Had that been done there would have been a speedy end to the litigation, and the heavy costs subsequently incurred would have been unnecessary.”

However there is no inflexible rule in this regard, and the Court still has a discretion: see *Cohen v. Haywood*, 1948 (3) S.A. 365 (A.D.) at pp. 374 – 375, where GREENBERG, J.A., said:

“in my opinion the question in each case is whether the party who did not take the exception was unreasonable in failing to do so. If he was, then he should not be entitled to the costs unnecessarily incurred in the case going to trial. Ordinarily it would be unreasonable of a party not to take an exception which, if allowed, would dispose of the case, but there may be circumstances which make it impossible to say that the omission to take the exception connotes unreasonableness.’

[14] There is accordingly no inflexible rule that questions of law arising from pleadings and capable of being resolved on exception may not be the subject of an application under Rule 33(4) in the High Court or under Rule 29(4) in the Magistrates’ Courts. A party who has failed to deliver an exception under the provisions of Rule 19 of the Magistrates’ Court Rules of Court at the appropriate stage and at the trial invokes the procedure under Rule 29(4) to take the exception, may be permitted to do so, but, depending on the circumstances, be mulcted in costs.

[15] The exception in this instance should have been taken at an earlier stage

after the appellant's counterclaim had been filed and within the period allowed for the filing of the respondent's plea thereto. The considerations mentioned in *Kriel* do, however, not obtain in this matter. The respondent notified the appellant in advance of the commencement of the trial, albeit short notice, of his intention to request the trial court to entertain the exception *in limine* under the provisions of Rule 29(4) and of the grounds upon which it was founded. The trial court did not make an order as to costs and the authorities to which I have referred should guide it when it is called upon to make an appropriate costs order in due course.

[16] The oral agreement pleaded in terms of the counterclaim is one that was entered into after the written agreement had been concluded. The respondent's contention, in terms of his notice in terms of Rule 29(4) of the Magistrates' Rules of Court, was that the oral agreement fell foul of the provisions of the written agreement. I have quoted the relevant clause earlier on in this judgment. It provides that no agreement to cancel, alter or add to the written agreement shall be of any force or effect unless signed by both parties. A non-variation clause '... curtails freedom to contract and must hence be restrictively interpreted.' *Per* Van Heerden, DCJ in *Randcoal Services Ltd v Randgold and Exploration Co Ltd* 1998 (4) SA 825 (SCA), at p 841 E-F. I am of the view that on a restrictive interpretation of the non-variation clause in this instance the alleged oral agreement falls foul of it and is accordingly of no force and effect. See: *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A), at pp 766H – 767B. The alleged oral agreement alters the written agreement insofar as it provides for occupation of the property to be given to the purchaser

or to be retained by the seller before or after registration of transfer of the property into the name of the purchaser, and it adds to the written agreement insofar as it provides for the payment of occupational rental.

[17] The appellant's counsel submitted that the trial court failed to take cognizance of the appellant's alternative claim for rectification as contained in paragraph 5 of the appellant's counterclaim. In *Leyland (SA) (Pty) Ltd v Rex Evans Motors (Pty) Ltd* 1980 (4) SA 271 (W), at p 272F – G and at p 273C, Melamet, J said the following:

'A written agreement which fails to express accurately the true intention of the parties may be rectified so as to make it accord with the parties' common intention. If the party seeking rectification can prove an actual agreement anterior to or contemporaneous with the writing with which the written agreement, owing to a mutual mistake, fails to conform, the Court will rectify the erroneous instrument. *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 288; *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253 and 256; *Von Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) at 409E.

....

A party who seeks rectification is not seeking to vary the written agreement but is merely seeking to place the true agreement before the Court and to have it interpreted and applied according to its true terms. Rectification does not constitute a "variation" of the written agreement as envisaged in clause 24, but rather a correction or completion of it so as to correctly reflect what the parties actually agreed.'

[18] The non-variation clause in this instance is also not a bar to the appellant's claim for rectification. The rectification pleaded in paragraph 5 of the appellant's counterclaim constitutes a correction or completion' of clause 4 of the written agreement. The appellant avers an actual agreement anterior to or contemporaneous with the writing - that occupational rent would be payable

where one party enjoys occupation while the other party is the registered owner of the property and that the amount would be the subject of a later verbal agreement between them - with which actual agreement their written agreement, owing to a mutual mistake, fails to conform. These averments on their own – without averring the conclusion of such later verbal agreement – are insufficient to disclose a cause of action in support of the appellant's claim for payment of occupational rent.

[19] Averments relating to the conclusion of a subsequent oral agreement that the respondent would pay occupational rent to the appellant in the sum of R20,000.00 per month between the dates of the respondent's taking occupation of the property and the registration of transfer thereof into his name are to be found in paragraph 4 of the counterclaim. The averments contained in paragraphs 5 of the counterclaim, however, are pleaded in the alternative to those contained in paragraph 4 thereof. The appellant accordingly relies on either the alleged subsequent oral agreement, which on its own is of no force and effect, or on an actual agreement anterior to or contemporaneous with the conclusion of the written agreement with which actual agreement their written agreement fails to conform and hence the claim for rectification of the written agreement, which on its own is insufficient to disclose a cause of action in support of his claim for payment of occupational rent.

[20] In the result the following order is made:

The appeal is dismissed with costs.

PHATUDI, J

[21] I agree with Meyer, J.

P.A. MEYER
JUDGE OF THE HIGH COURT
PRETORIA

A.M.L. PHATUDI
JUDGE OF THE HIGH COURT
PRETORIA

15 May 2012

Date of Hearing:	15 May 2012
Date of Judgment:	15 May 2012
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